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ABSTRACT

Sexual harassment under the Equal Employment Opportunity Commission guidelines involves unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, as it applies to males or females in business situations. Harassment is discriminatory when females must act differently than males in order to receive the same opportunities. This is evident in cases where sexual submission is a condition of employment or advancement. The law requires that employees be treated equally, but does not require that they be treated fairly. Harassment is coercive when it threatens employee job security and interferes with work performance. Employers are responsible for their own acts, as well as those of supervisors, employees, and some non-employees, such as clients and customers. Employers are expected to prevent sexual harassment and to take immediate corrective action should it occur. Legal responsibility is determined per individual case. (BY)

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# SEXUAL HARASSMENT:

# STATE OF THE LAW

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SEXUAL HARASSMENT:

STATE OF THE LAW

## Introduction

The subject of this paper has been in existence since men and women began working together in a business setting. It was recognized as being sexual exploitation and coercion, but it was considered the price to be paid for invasion of male-dominated territory. The use of the term sexual harassment, however, is new and did not, in fact, exist until the mid-1970's, when it was used to describe unfavorable treatment in employment received by women because of their refusal to accede to the sexual advances of a fellow employee. In other words, women found themselves being treated not as human beings, but as sexual objects, in situations where they had the right to expect exactly the opposite.[1] In fact, it was not until November 10, 1980, that the Equal Employment Opportunity Commission (EEOC) published its final guidelines, explicitly recognizing sexual harassment as a form of employment discrimination under Title VII of the Civil Rights Act of 1964.[2]

## Definition

Before we proceed further in this discussion of sexual harassment, it would be helpful to look at its legal definition. Under the EEOC guidelines, the definition covers unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.[3] Such acts are sexual harassment:

> (1) when submission is made a term or condition of employment;
> (2) when submission is used as a basis for employment decisions;
> (3) when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment.[4]

It is any reference or overt behavior of a sexual nature in the context of a work situation which has the effect of making a woman uncomfortable on the job, regarding her ability to perform, or interfering with job opportunities. Sexual harassment can be accomplished by look, touches, jokes, innuendoes, gestures, or direct propositions.[5]

## Harassment as Discrimination

Most courts have accepted the argument that sexual harassment can constitute unlawful sex discrimination, believing that such conduct effectively requires that the female employee act differently than a male employee in order to receive the same treatment in terms of performance appraisals and promotion opportunities. Sexually harassing behavior is coercive because it threatens a woman's job satisfaction and her security. It is, thus, behavior which attempts to keep women "in their place", as persons who can change their circumstances only by trading on their sexuality.[6]

In the study and examination of this subject, however, it is vital to know that the law does not require an employer to act fairly toward employees in some general or abstract sense. What it does require is that the employer treat all employees equally, regardless of race, color, religion, national origin, or sex. For example, a woman who sued her employer for sexual harassment, due to her supervisor's use of abusive language and abusive discipline, was held not to have established a case, because the supervisor treated all employees in the same, abusive manner.[7] All that is required of the employer is that he furnish a bias-free atmosphere in which to work. Title VII does not prohibit tacky conduct or poor taste.

Several cases decided on the basis of Title VII sexual harassment are much like the racial and ethnic harassment cases, involving abusive and joking conduct. Others have involved unwelcome sexual advances from management.

Still, a third group centers on the creation of an offensive or hostile working environment. Each group of cases will be individually presented and discussed.

Before further discussion and examination, it should be noted that sexual harassment can be directed at men, as well as at women. Also, women and men may register complaints against members of their own sex.[8] Nevertheless, this discussion will be confined to a review of female-filed charges of sexual harassment - and for obvious reasons. Women are overwhelmingly employed in low status, dead-end jobs[9], primarily in the clerical (35% of all women workers) and service (19.6% of all women workers) areas.[10] Women make up less than 3% of engineers, 5% of dentists, 11% of physicians, 13% of attorneys, 19% of scientists, and, very significantly, 25% of all salaried managers, officials, and administrators.[11] This translates, in economic terms, to mean that women earn $.59 for every $1.00 earned by comparably employed men, with no narrowing of the gap since the Civil Rights Act of 1964.[12] The potential for sexual harassment is enormous.

Hazing

Normally, hazing is not a practice engaged in by supervisors, but is, instead, perpetrated by coworkers. Does that mean, then, that the employer is let off the hook? The answer in several cases is a resounding NO!

The leading case in this area involves a female engineer who encountered verbal abuse (remarks concerning her marital status and virginity), nonverbal conduct (passing around a cartoon with a nude, obese woman), and was fired after filing charges when management did nothing to halt the offensive behavior. The employer, as well as the coworkers, were found liable for damages under Title VII.[13] It would be very enlightening to examine that case closely for clues to hold management responsible.

When confronted with the situation, management did nothing to stop the abusive practices. Instead, management hid its head in the sand, either believing that it was a private matter to be handled by the woman on her own, or finding it embarassing, yet "normal and expectable"[14] sex-role behavior. THe employer's response was to transfer the woman to another floor, due to her failure to get along with coworkers, because that sort of thing happens in a man's world all the time. Her supervisor went so far as to suggest that she should be flattered by such conduct. In other words, no harm done if none meant.[15]

Under EEOC guidelines, transfer alone is not adequate to counteract sexual harassment. Management must develop appropriate sanctions[16] to deal with the situation, and what is appropriate must be determined in individual cases.

As you might imagine, the transfer did not solve the problem, and management told the female engineer to get professional counseling for her paranoid delusions, or she would be fired. It was at this point that management began to "document" the case. None of the memoranda were allowed, however, because the situation had already escalated to the point of likely litigation. The documents were self-serving. The woman was discharged as soon as her employer learned of the filing of her EEOC charges.

The actions of the employer in this case were held by the court to have given approval to the harassment. Once an employer knowingly allows such conduct to continue, he acquiesces in it and constructively makes the female employee's tolerance of the harassment a condition of her employment.

In some situations an employer may also be responsible for the sexual harassment of an employee by a nonemployee, such as a client or a customer. Under the EEOC guidelines, the employer's liability hinges on its knowledge of

the harassment, its failure to take immediate and appropriate corrective action, and the extent to which the employer has control over the non-employee's conduct.[17]

The key to avoidance of liability in all of these situations is that management must act immediately and effectively to combat the discriminatory practices. If the employer sits back on his haunches, he will find himself, as well as his employees, responsible for damages.

Unwelcome Advances

The second body of cases deals with actions on the part of the supervisor or manager, and such actions occur in two stages. The first stage involves a sexual advance toward an employee, the advance being rebuffed. Then, the supervisor retaliates against the employee because of the rejection. Both elements must be present for employment discrimination to exist.[18] The female plaintiff must prove that advances or demands of a sexual nature were made on her by a supervisor; that the demands were made because of her sex; and that the harassment resulted in negative employment consequences. Once this prima facie case has been made out, the employer must produce evidence establishing a legitimate, non-discriminatory reason for the negative employment action. If he does so, then the female must show that such defense is a mere pretext and that the real reason for her mistreatment was her failure to submit to the sexual demands.[19]

Unfortunately, most of the courts dealing with this issue have narrowed the scope of employer accountability. Additional factors have been introduced, such as company policy or employer knowledge, and the question of employer liability has tended to turn on those issues.[20] The approach that has evolved is that the employer must take some action to stop a supervisor or to intervene when the employer knows, or should know, that the supervisor has

made or is making sexual demands as a term or condition of employment. The employer is then required to take prompt and appropriate action.[21] However, merely establishing a policy which forbids retaliation for rejection of sexual advances is not enough. Such policy will not protect an employer from liability for a supervisor's actions because of the common-law doctrine of respondeat superior, which holds the employer liable for wrongful actions committed by the employees within the scope of their employment.[22]

Even when an employer has such an established policy and an internal procedure for handling complaints regarding sexual harassment, the employee who has been victimized need not follow such internal procedure before she has a legal right to sue. An employer cannot use his own means to get around or lessen an employee's rights under Title VII. However, once an employer receives notice of suit, he has the right to use his own procedures to attempt to remedy the problem. If the employer takes such remedial action, it tends to weaken the employee's case.[23]

Employers have advanced other theories to try and avoid liability for sexual harassment. One argument is that retaliation for rejection of sexual advances is not really sex discrimination in employment, because the true basis for the retaliation is the employee's refusal to furnish the sexual consideration. This argument has been rebuffed by courts on the theory of "sex-plus' discrimination, which is based in part on sex and in part on another factor. If the sexual demand would not have been made if the employee had been male, then sex was one of the bases for the employment decision.[24]

The final, even weaker, argument advanced by employers is that they should not be held responsible for the purely personal actions of the supervisor, especially if the employer was unaware of such actions. One court has defeated that contention by holding the the employer had a policy or acquiesced in the practice of forcing female employees to submit to the sexual

advances of male supervisors, in contravention of Title VII.[25] The determination of whether or not the practice was a nonemployment-related personal encounter or an employment practice is a question of fact to be decided in each case. If the making of employment-related sexual demands on female employees is a policy or practice of the supervisor, it will be imputed to the employer.[26]

Most courts which have dealt with claims of sexual harassment have looked on them as a special type of employment discrimintion, deciding the outcome not strictly on Title VII principles. Accordingly, additional elements have been added to the making of a prima facie case against an employer. Even without such requirements, the employer is not defenseless. It has the same defense as in any type of discrimination case - proof of a legitimate, non-discriminatory reason for the ensuing employment consequences. Without employer liability, women will be unable to recover, even in instances where they can prove their charges. Even more important, the employer will have no incentive to take preventive steps to do away with sexual harassment in the workplace.

Hostile or Offensive Atomsphere

Under the EEOC guidelines, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature can be sexual harassment if they have the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[27] The intentions behind the conduct are irrelevent. It need only have the effect of creating an offensive situation to be unlawful under Title VII. As such, the victim need not be the person at whom the unwanted sexual conduct is directed. It may be someone who is affected by the sexual harassment of a coworker.[28]

Such harassment can come from a number of sources: supervisors, coworkers, nonemployees. The guidelines specify that the employer is to be held strictly liable for any violation coming from the actions of its agents and supervisory personnel, regardless of whether the employer knew of the actions or even specifically banned them.[29] Again, as previously discussed, the employer may be liable for actions of nonemployees, such as customers or clients, if it can be shown that the employer has either control over or legal responsibility for the conduct of the nonemployee. This liability can be avoided, however, in the case of coworkers and nonemployees, if the employer can prove that it took immediate and appropriate corrective action.[30]

The EEOC has been joined by several courts in its recognition of offensive working conditions that result from unwelcome sexual advances as Title VII sex discrimination.[31] One court found that failure to extend Title VII protection in the absence of some tangible action against the employee who resists sexual advances would free the employer to sexually harass employees, so long as it stopped short of tangible adverse actions and denying recourse to employees.[32] This theory of liability has been extended by the court in a recent case. A woman was hired as a lobby attendant in a Manhattan office

building. After three years, new outfits were designed for employees. The lobby attendant received a very skimpy and sexually revealing Bicentennial outfit. She protested but was instructed to wear the outfit or give up her job. When she did so, she began receiving unwanted sexually suggestive comments from people entering the building. When she refused to continue wearing the outfit, she was discharged. The court concluded that by requiring the plaintiff to wear the revealing uniform, the employer forced her to acquiesce in sexual harassment by the public and by building tenants, and as such made the sexual harassment a condition of her employment, in violation of Title VII.[33]

It is important to realize, however, that the Supreme Court has not yet ruled on the issue of a standard for establishing sex harassment conditions, and it may yet refuse to apply for what the EEOC and federal courts have addressed.

## Conclusion

Sexual harassment is the first legal wrong to be addressed by women[34], and as such, has been called a product of feminism. Sex discrimination law now prohibits requiring sexual compliance in exchange for material survival or educational benefits[35], as well as compulsory provocative uniforms which make women appear to "ask for it" on the job.[37] To coin a phrase, we've come a long way, baby, but we still have a long way yet to go. Until employer liability for sexual harassment is treated similarly to that in all other discrimination cases, the victory that women won when sexual harassment was held to constitute actionable discrimination under Title VII may be a hollow one, and our struggle for equal employment opportunity will continue to be limited.

APPENDIX

Sex Discrimination Guidelines

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action, in reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for other unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(45 Fed. Reg. 25025, Apr. 11, 1980; amended 45 Fed. Reg. 74677, Nov. 10, 1980.)

[1] Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.).

REFERENCES


[1] C. MacKinnon, Sexual Harassment of Working Women: A Case History of Sex Discrimination 27-28, 250 (1979).

[2] See Appendix - Sex Discrimination Guidelines, 45 Fed. Reg. 25025, Apr. 11, 1980; amended 45 Fed. Reg. 74677, Nov. 10, 1980.

[3] 45 Fed. Reg. 747677 (1980).

[4] Id.

[5] At one end of the spectrum, it involves the direct demand for sexual favors, along with the threat of dismissal for refusal. At the other, it is being forced to work in an environment where the woman is subjected to stress or humiliation because of her sex, whether it be done by means of sexual slurs, public display of derogatory images of women, or requirements of dress in revealing clothing.

[6] Taub, "Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination," 21 B.C. L. Rev. 345, 368.

[7] Gilliam v. City of Omaha (1975), 524 F. 2d 1013.

[8] Huebschen v. Department of Health and Social Services (W.D. Wis. 1982), ____ F.Supp. ____. Also, cause of action allowed based on termination of male employee who refused advances of his male supervisor. See Wright v. Methodist Youth Services (N.D. Ill. 1981), 511 F. Supp. 307.

[9] Blumrosen, "Wage Discrimination, Job Segregation and Women Workers," 6 Women's Rts. L. Rep. 19, 25 (1980).

[10] U. S. Dept. of Labor Statistics, "Employment and Earnings" (May 1980).

[11] U. S. Dept of Labor Statistics, "Employment and Earnings" (Jan. 1980).

[12] U. S. Dept. of Labor, Women's Bureau, "The Earning Gap Between Women and Men" (1979).

[13] Kyriazi v. Western Electric Co. (N.J. 1978), 461 F.Supp. 894.

[14] Barnes v. Costle (1977), 561 F. 2d 983, 1001.

[15] Neely v. American Fidelity Assurance Co. (W.D. Okla. 1978), 17 FEP Cases 482 (CCH).

[16] 29 CFR § 1604.11(d).

[17] 29 CFR § 1604.11(e).

[18] If the advance is not rebuffed and the employee receives some employment advantage in exchange, that may be a different type of discrimination against an employee who was not given such employment advantage. This theory has not yet been considered by the courts.

[19] Burdine v. Texas Dept. of Community Affairs (1979), 608 F. 2d 563, 100 S.Ct. 3009 (1980).

[20] Brown v. Gutherie (W.D. Okla. 1980), 22 FEP Cases 1627 (CCH); Heelan v. Johns-Manville Corp. (Colo. 1978), 451 F.Supp. 1382.

[21] Heelan v. Johns-Manville Corp. (Colo. 1978), 451 F.Supp. 1382; Tomkins v. Public Service Electric and Gas Company (1977), 568 F. 2d 1044.

[22] Miller v. Bank of America (1979), 600 F. 2d 211.

[23] Id.

[24] Barnes v. Costle (1977), 561 F. 2d 983; Williams v. Saxbe (1976), 413 F.Supp. 665.

[25] Garber v. Saxon Business Products, Inc. (1977), 552 F. 2d 1032.

[26] Williams v. Civiletti (1980), 487 F.Supp. 1387; Williams v. Saxbe (1976), 413 F.Supp. 665.

[27] 29 CFR § 1604.11(a).

[28] The sexual harassment of one female employee may create an intimidating working environment for another female or for a male coworker. EEOC Compliance Manual 615.2(a) (4).

[29] 29 CFR § 1604.11(c).

[30] 29 CFR § 1604.11(d) and (e).

[31] Henson v. City of Dundee (1982), ____F. 2d ____; Bundy v. Jackson (1981), 641 F. 2d 934.

[32] Bundy v. Jackson (1981), 641 F. 2d 934.

[33] EEOC v. Sage Realty Corp. (S.D. N.Y. 1981), 521 F.Suppp. 263.

[34] From all of the research that I have done, I can find no other instance of this in our American legal system.

[35] Tomkins v. Public Serv. Elec. and Gas Co. (1976), 422 F.Supp. 553.

[36] Bundy v. Jackson (1981), 641 F. 2d 934; Wilson v. Northwest Publications, Inc., "Report of Hearing Examiner of Human Rights" (Minnesota), May 10, 1979 (144479).

[37] EEOC v. Sage Realty Corp. (S.D.N.Y. 1981), 521 F.Supp. 263.